

## II

(Acts adopted under the EC Treaty/Euratom Treaty whose publication is not obligatory)

## DECISIONS

## COMMISSION

## COMMISSION DECISION

of 10 May 2007

**on State aid C 2/06 (ex N 405/05) which Greece is planning to implement for the early voluntary retirement scheme of OTE**

(notified under document number C(2007) 1436)

(Only the Greek version is authentic)

(Text with EEA relevance)

(2008/722/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to those provisions<sup>(1)</sup> and having regard to their comments,

Whereas:

further information by letter registered by the Commission on 9 November 2005. On 22 December 2005, the Greek authorities complemented their above-mentioned reply with additional information.

(3) By letter dated 8 February 2006, the Commission informed Greece that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the measure in question and asked for information to be provided on a number of issues.

(4) The Commission decision to initiate the procedure was published in the *Official Journal of the European Union* <sup>(2)</sup>. The Commission called on interested parties to submit their comments.

## I. PROCEDURE

(1) By letter registered on 11 August 2005, the Greek authorities notified the planned financial contribution of the Greek State to the early voluntary retirement scheme offered by OTE to certain categories of its employees.

(2) By letter of 23 September 2005, the Commission requested additional information in relation to the notified measure. After having requested and been granted an extension, the Greek authorities submitted

(5) On 3 May 2006, Greece submitted its comments and the information requested by the abovementioned decision. Further information was submitted on 14 July 2006, 2 August 2006, and 3, 5, 6 and 9 October 2006.

(6) On 31 July 2006, the Commission received comments from one interested party that solicited anonymity and forwarded them to Greece, which was given the opportunity to react.

<sup>(1)</sup> OJ C 151, 29.6.2006, p. 2.

<sup>(2)</sup> Idem.

- (7) On 18 October 2006, Greece submitted its reply to the comments submitted by the above mentioned interested party. With the consent of Greece, the Commission forwarded the said reply to the interested party.

## II. DETAILED DESCRIPTION OF THE AID

### 1. The recipient

- (8) The Hellenic Telecommunications Organisation (OTE) was founded in 1949 and is a public limited company listed on the Athens Stock Exchange and on the stock exchanges of New York (NYSE) and London (LSE).
- (9) Until full liberalisation of the Greek telecommunications market on 1 January 2001, OTE was the sole provider of fixed voice services and telecommunications networks in Greece, including local, long-distance and international communications services. Today, OTE is present in almost all segments of the broader electronic communications market (fixed, mobile, Internet, maritime and satellite communications) both as a network operator and as a service provider.
- (10) Following full liberalisation in January 2001 and the ensuing market entry by alternative electronic communications operators, OTE's market share for (fixed) voice calls gradually dropped from 94 % in 2002 to 73 % at the end of 2005<sup>(3)</sup>. Likewise, the fall in market share as well as wider technological trends, such as fixed-to-mobile substitution, have also led to a fall in OTE's fixed revenues from around EUR 3,4 billion in 2001 to around EUR 2,6 billion in 2005. The decline in revenues has not been matched by a fall in operating costs and in 2004 the company recorded a net operating loss for the first time in its history. Despite this, OTE remains today the leading operator in the provision of fixed voice services and enjoys a quasi-monopolistic position as the only access network provider in the fixed market<sup>(4)</sup>.

<sup>(3)</sup> See OTE Annual report 2005, at [http://www.ote.gr/english/investorrelations/Files/OteAnnualReport05English\\_Final.pdf](http://www.ote.gr/english/investorrelations/Files/OteAnnualReport05English_Final.pdf)

<sup>(4)</sup> According to the latest Commission Implementation Report, 'in September 2005 there were 24 authorised public fixed voice telephony operators of which 13 were commercially offering fixed voice telephony services over a leased or own network. These include the incumbent but do not include operators acting as resellers or suppliers of prepaid services. Although the incumbent is still strong in the fixed calls market, there has been some significant progress towards more competition, reflected in the fact that the incumbent's retail revenues market share fell from 85 % in December 2003 to 76 % in December 2004, while there were three additional operators, which, together with the incumbent, accounted for 90 % of the market': see the Annex to the Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, 'European Electronic Communications Regulation and Markets 2005' (11th Report) COM(2006) 68 final, at p. 120, [http://ec.europa.eu/information\\_society/policy/ecomms/doc/implementation\\_enforcement/annualreports/11threport/sec\\_2006\\_193-vol1.pdf](http://ec.europa.eu/information_society/policy/ecomms/doc/implementation_enforcement/annualreports/11threport/sec_2006_193-vol1.pdf)

- (11) In Greece, the liberalisation of the electronic communications market on 1 January 2001 was not accompanied by the full privatisation of OTE. At the time of the notification, the Greek State held 38 % of the company's share capital, with the remaining capital being held by Greek institutional investors (12 %), international investors (29 %), Hellenic Exchangeable Finance S.C.A. (11 %) and the public at large (10 %). In August 2005, through a convertible bonds transaction, Hellenic Exchangeable Finance sold its 11 % participation in OTE to the Greek State. On 7 September 2005, the Greek State sold a 10 % stake in OTE, reducing its participation in OTE to 38,7 %.

- (12) However, despite the full liberalisation of the market and its partial privatisation, OTE remains subject to the laws and trade union agreements adopted before liberalisation. As a result, the legal framework applicable to OTE shows several particularities as compared to the ordinary law applicable to its competitors. In particular, (a) OTE employees enjoy a *de facto* permanent status<sup>(5)</sup>, and (b) OTE faces additional labour costs, namely higher employer and employee social security contributions, higher salaries for less qualified employees and increased compensation payments in case of retirement. The main aspects of the labour law arrangements applicable to OTE are set out in recitals 13 to 18.

### 2. Labour law arrangements applicable to OTE

- (13) To date, OTE remains subject to a number of specific laws and 'collective employment agreements' that were adopted before liberalisation in 2001 and which depart from the current labour legislation applicable to other public limited companies in Greece. In particular, OTE's obligations towards its employees are governed by (a) Greek employment law, (b) collective employment agreements negotiated between OTE and the employees' union (OME-OTE), mainly before the market was liberalized, and (c) OTE's general employment statute ('GES').
- (14) The labour legislation applicable to OTE exhibits several particularities as compared to the ordinary rules.

<sup>(5)</sup> The job security that OTE employees enjoy as a result of their permanent status derives from Article 2(2)(b) of Law No 2257/94, which ratifies OTE's general employment statute. According to Articles 2 and 17 of the statute, OTE cannot unilaterally terminate an employment contract. This implies that OTE cannot freely operate in the market by deciding which employees must leave or by forcing them unilaterally to leave after offering them legal compensation in return.

- (15) First, all its employees enjoy a *de facto* quasi permanent status. Articles 2 and 17 of the GES provide that OTE cannot unilaterally terminate an employment contract in order to reduce its workforce. According to Greek Law No 2257/1994, the provisions of OTE's GES have the same binding effect as any other Greek law. As a result, the labour status of OTE employees cannot be modified without the latter's consent and the passing of legislation giving effect thereto.
- (16) Second, OTE has to pay social security contributions for employees hired before 31 December 1992 <sup>(6)</sup> at rates which exceed the rates fixed under the generally applicable social and labour laws. For OTE, employer and employee contributions amount to 25 % and 11 % respectively, whereas contributions in the private sector amount only to 13,33 % and 6,67 % respectively. For employees taken on after 1 January 1993, social security contributions are similar to those in the private sector.
- (17) Third, the current GES prohibits salary increases based on considerations other than an employee's formal qualifications and seniority in the company. OTE cannot therefore increase salaries based on employee productivity and/or achievements. On the basis of past agreements with the trade unions, new recruits enjoy higher entry-level salaries compared to the private sector, while experienced employees in management posts receive lower salaries.
- (18) Finally, according to the applicable legal framework, OTE has to make higher lump-sum payments for retirees. Upon retirement, OTE employees receive two lump sums: (a) a lump sum imposed by the law, equivalent to 11,6 times the last gross monthly salary, and (b) a lump sum negotiated by OTE and the unions not exceeding EUR 20 100, plus 9 gross monthly salary payments (compared to 9,6 salary payments in the case of private firms).

### 3. Retirement scheme

- (19) OTE employees are obliged to retire when (a) they complete 35 years of full service or (b) when they complete 30 years of full service, and reach the age of 58 years, or (c) when they reach the age of 62 years and fulfil the minimum years of service under the law, namely 15 years or 4 500 days of work. Those who are entitled to a pension but have not reached the age for mandatory retirement can continue to work until they do so.

<sup>(6)</sup> This category of employees accounts for 84 % of the company's workforce.

- (20) Upon retirement, OTE employees are entitled to a pension in accordance with the conditions set out in the Greek social security legislation that applies to a series of special pension funds, including OTE's pension fund. This means that OTE employees are entitled to a full pension, that is to say 80 % of their final salary. Their main pension is paid by the public-law Insurance Fund for OTE Employees (TAP-OTE) <sup>(7)</sup>. An auxiliary public law insurance scheme which manages the 'OTE Assistance Fund' further provides a maximum auxiliary pension of 20 % of the final salary. Both the general pension (80 %) and the auxiliary pension (20 %) are incorporated into law and thus mandatory for OTE.

### 4. The restructuring of OTE and the VRS

- (21) Based on a study carried out by the McKinsey consulting firm and in order to ensure the long-term viability of the company, OTE adopted a package of restructuring measures in May 2004, the key element of which is the voluntary retirement scheme (VRS). With the VRS, OTE aims to reduce its permanent staff and be in a position to recruit new qualified staff that will no longer enjoy permanent status.
- (22) OTE currently employs around 16 000 people enjoying guaranteed employment. The McKinsey study indicated that OTE could operate and offer the same kind of services with approximately 30 % fewer employees. In addition, the study highlighted the need to recruit qualified staff capable of dealing with IT, new technologies, marketing sales, finance and regulatory issues. The average age of OTE's staff (47 years) and the fact that only a small percentage of the current workforce (19 %) holds a university or college diploma further compound OTE's labour inflexibility.
- (23) An abolition of the permanent status of existing OTE staff — which could have enabled OTE to reduce its workforce like any other company — would have given rise, according to the Greek authorities, to serious legal constitutional concerns and was therefore discarded as an unrealistic option. Given the permanent status of OTE's employees as currently enshrined in legislation, a reduction in the workforce was possible only with the consent of the employees' trade union (OME-OTE). In this respect, a VRS was first agreed between

<sup>(7)</sup> The main pension fund for OTE employees is TAP-OTE. TAP-OTE is an independent legal body governed by public law, like all other pension funds in Greece. It has its own board of directors, administration, budget and finance departments. It covers both OTE employees and employees of other companies. It is divided into a pension division and a health division. Besides TAP-OTE, there is also an auxiliary fund. The OTE auxiliary fund has two schemes, the assistance scheme and the auxiliary insurance scheme. OTE employees are entitled to a pension under Greek social security legislation, which applies to all public law funds such as TAP-OTE. Both the main and the auxiliary pensions are obligatory under Greek law.

OTE and the company's trade union in February 2005, conditional upon the Government passing legislation giving it binding effect. In May 2005, OTE also concluded a collateral collective employment agreement with the trade union whereby any new recruits would no longer benefit from the permanent status.

- (24) The relevant legislation was passed on 14 July 2005 (Law No 3371/2005) and the VRS agreement between OTE and the trade union was finalized on 20 July 2005. This provided the legal framework which OTE needed in order to offer early retirement to around 6 000 people while at the same time being able to take on new staff (around 1 200 people) subject to the ordinary labour laws (i.e. with no permanent status).
- (25) The right to early retirement was given to employees who by 2012 will have reached the mandatory retirement age, namely the age of 58 and 30 years of service, or 35 full years of service, or the age of 62 years and 15 years of service. The remaining years of service ('notional years') of employees opting for early retirement would be recognised and these employees would be entitled to immediate pension payments. The recognition of a maximum of eight notional years of employment is the basis for the calculation of the main and auxiliary pensions as well as the two lump-sum retirement payments, one from OTE and one from the auxiliary fund.
- (26) Other employees who are close to retirement and already fulfil the general requirements for full pension rights would be entitled to only one lump-sum payment of between EUR 5 000 and EUR 30 000 <sup>(8)</sup>.
- (27) According to the Greek authorities, the conditions of the current VRS had to be more generous than similar early retirement measures in the past in order to ensure maximum take-up by employees <sup>(9)</sup>.

### 5. Legal framework for the VRS and its financing

- (28) On 14 July 2005, following the conclusion of the agreement between OTE and the trade unions on the implementation of the VRS, the Greek Parliament adopted Law No 3371/2005. Article 74 of that Law gives the necessary legal effect to the VRS and lays down the State's financial contribution to the scheme.

<sup>(8)</sup> Employees who have already completed 30 years of service and are entitled to a pension will not qualify for the recognition of notional years, i.e. a full pension, but will be entitled to extra incentives.

<sup>(9)</sup> A previous early retirement scheme was accepted only by around 75 % of employees, which was regarded as a very low percentage.

- (29) In particular, Article 74 of the Law gives permanent OTE employees reaching the statutory retirement age by 31 December 2012 the possibility of requesting immediate discharge while receiving the pension they would have received if they remained with OTE until that date. For that purpose, the employees are granted recognition of as much notional employment time as necessary, with regards to both the main and the auxiliary pension. Following discharge, the employees are entitled to immediate payment of the pension calculated in this way.
- (30) The expenditure arising from the recognition of notional employment time in respect of the total pension contributions of the employees and of the employer, as well as the expenditure arising from the pensions which are awarded by TAP-OTE, will be borne by OTE and the Greek authorities. On the other hand, the costs relating to the auxiliary pensions and the lump-sum payment is to be borne entirely by OTE.
- (31) Pursuant to Article 74(4)(a) of Law No 3371/2005, the Greek authorities are to transfer 4 % of the share capital of OTE to TAP-OTE. The value of the Greek State's contribution to the VRS is calculated by multiplying the total number of shares (490 582 879) in OTE by 4 % and by the current OTE stock value as quoted on the Athens Stock Exchange. Under to the Law, the Minister for Economic Affairs and Finance is authorised to sign contracts effecting the aforesaid transfer and setting out the rights of the Greek State in relation to those shares, including the Greek State's right to buy back the shares if it so wishes (call option), but also the obligation to do so should the pension fund need cash to fund the pension benefits under the VRS (put option) at their closing price on the day of the non-stock-market transfer. Implementing measures and other details concerning the execution of these options have not yet been specified, pending the Commission's assessment.

### 6. Costs of the VRS and value of the Greek State's financial contribution

- (32) In the notification, the Greek authorities explained that the costs of the VRS based on the expected departure of 6 000 employees would amount to approximately EUR 1,5 billion spread over a period of seven years (i.e. from 2005 to 2012), with the main costs accruing from 2005 to 2007. In 2005 the expected costs of the scheme were estimated at around EUR 500 million. At current prices, the costs would amount to approximately EUR 1,2 billion <sup>(10)</sup>.

<sup>(10)</sup> According to the Greek authorities, the net present value was calculated on the basis of on a discount rate of 7,83 % and reflects the estimated weighted average cost of capital (WACC) for OTE as determined by three financial analyst reports issued in 2005.

- (33) On 20 December 2005 the Greek authorities informed the Commission that a total number of 5 525 employees had submitted a valid application within the required timeframe for taking part in the VRS, approximately 90 % of the initially envisaged workforce reduction. Notwithstanding the fact that the exact figure would not be known until all applications had been fully processed and assessed in detail, the Greek authorities estimate that the overall cost of the VRS will be around EUR 1,1 billion (or around EUR 863 million in net present value terms).
- (34) As indicated above, the Greek State's participation takes the form of a transfer of 4 % of its shares in the company to the TAP-OTE pension fund.
- (35) Based on the share price of OTE on the date of the publication of the Law (14 July 2005), the value of the 4 % of the shares to be transferred from the State to the pension fund was around EUR 315 million. However, given that the value of the shares will be determined on the day of the transfer, the State's contribution may well be higher. Since July 2005, the share price of OTE has increased from around EUR 16 in July 2005 to around EUR 23 by mid-January 2006, and around EUR 22 in early February 2007.

#### 7. The arguments of the Greek authorities

- (36) The Greek authorities consider that the State's contribution to the VRS does not constitute State aid. In providing finance for the VRS, the Greek State has acted like a private investor. Furthermore, the State's contribution only partially relieved OTE from the extra costs resulting from the VRS as compared to less costly similar schemes offered under the generally applicable labour laws and regulations. Consequently, the aim of the State's contribution was merely to restore a level playing field and therefore not to distort competition.
- (37) The Greek authorities take the view that OTE is at a disadvantage vis-à-vis its competitors in the recently liberalised market for fixed telephony. Due to the life tenure status of OTE employees, OTE could not unilaterally dismiss staff but had to have recourse to voluntary redundancy offers. In order for such an offer to be attractive, OTE had to offer its employees voluntary redundancy terms and conditions that reflected the latter's permanent status.
- (38) More particularly, the State's contribution to the VRS would compensate only partially for the additional costs caused by two main types of structural disadvantages which are due to the legacy of OTE as a state-owned monopoly: (a) the permanent quasi-civil-servant status of OTE employees, guaranteed by law, and (b) the higher salaries (also imposed by law) which significantly increase the overall costs of the scheme. As a result, OTE is put at a disadvantage vis-à-vis its competitors in the recently liberalised market for fixed telephony. Thus, the State's contribution can be deemed to be in line with recent case-law in this area, and in particular with the judgment of the Court of First Instance in *Combus* <sup>(11)</sup> according to which freeing a public-sector company from structural disadvantages as compared to its private-sector competitors, such as those due to the 'privileged and costly status of officials', does not constitute State aid.
- (39) The Greek authorities proposed a two-stage calculation aimed at identifying separately (a) the financial burden imposed on OTE by the permanent status, and (b) the burden imposed by inflated salaries.
- (40) In particular, the financial burden imposed on OTE by the permanent status is calculated by comparing the costs of the planned VRS and the costs that would have been incurred had OTE been a private company able to dismiss its staff offering the minimum compensation required by law in the case of dismissal. However, given that under Greek law mass redundancy schemes are subject to prior ministerial authorisation <sup>(12)</sup>, the Greek authorities consider that a private company would also most likely have had to offer more generous terms than the minimum legal requirements in order to implement a wide-ranging VRS. In this respect, the Greek authorities estimate that private companies would have offered benefits 1,5 to 2,5 times in excess of the redundancy compensation payments provided for by law, or on average twice the legal redundancy compensation payments <sup>(13)</sup>. In this case, the additional permanency costs of the VRS would be EUR 269 million.

<sup>(11)</sup> Case T-157/01 *Dansk Busvognmænd v Commission* [2004] ECR II-917.

<sup>(12)</sup> Currently, existing law allows redundancies of up to two percent of the workforce with a cap at 30 employees per month. According to the notification, a large-scale redundancy programme would require the granting of a special authorisation from the Ministry of Labour. No such authorisation has been granted at least in the last decade and no mass redundancy scheme has been undertaken by a Greek private company on the scale of the VRS.

<sup>(13)</sup> In this respect, the Greek authorities have made reference to a redundancy compensation package offered by a large private operator, Intracom, which offered in the past to certain categories of its employees twice the legal redundancy compensation (this coefficient was gradually reduced for higher salaries down to 1,4 times the legal redundancy compensation) within the context of an early redundancy scheme. In addition, the said company is said to have offered other advantages such as lump sum payments and extended insurance coverage for a certain period of time.

(41) Next, comparing the cost of OTE's VRS with the costs of a VRS based on private-sector salaries, which are roughly one third lower than salaries paid by OTE, the Greek authorities estimate the additional salary burden on OTE at EUR 193 million, based on a comparison between OTE's costs and twice the minimum legal redundancy compensation payments. Taking the alleged additional costs due to both permanency and higher salaries together, the total extra burden imposed on OTE amounts to EUR 462 million, which exceeds the State's contribution as estimated at the time of the notification (around EUR 315 million).

(42) On 20 December 2005 the Greek authorities submitted to the Commission updated calculations based on the definitive number of employees who had applied for the VRS. In updating its calculations, the Greek authorities asked the Commission also to take into account certain extra costs that had arisen due to unavoidable time delays in the initially planned launch of the implementation of the VRS (deferral costs) <sup>(14)</sup>.

### III. DECISION TO INITIATE PROCEEDINGS UNDER ARTICLE 88(2) OF THE TREATY

(43) In its decision to initiate the formal investigation, the Commission expressed doubts as to the validity of the abovementioned arguments of the Greek authorities, for the following reasons.

#### a. *The financial contribution by the Greek State*

(44) First, the Commission questioned whether the financial contribution was provided in line with the market economy investor principle since no other investor in the company contributed financially to the early retirement scheme. Moreover, all investors would benefit equally from the expected increase in the company's value, without the Greek State receiving a return proportionate to its contribution. Furthermore, the Greek authorities have not shown that they could expect a reasonable return from their contribution.

<sup>(14)</sup> According to the Greek authorities, owing to a delay in the implementation of the VRS, some employees would no longer be eligible under the VRS since they had reached the mandatory retirement age. Moreover, given that it will take another year for OTE fully to implement the VRS, OTE would still have to continue paying (high) salaries for those eligible for early retirement. If these (deferral) costs are taken into account, the total costs of the VRS increase to EUR 1,37 billion, or approximately EUR 1 billion expressed in net present value terms.

#### b. *The costs of similar VRSs in the private sector*

(45) Second, the Commission questioned whether the Greek Government's financial contribution was actually limited to relieving OTE of alleged extra costs compared to other operators offering redundancy/early retirement schemes to their employees. In particular, the Commission doubted that the only example put forward by the Greek authorities, according to which a normal company would, in the context of voluntary redundancy plans, offer around twice the redundancy compensation required by law for dismissals, could be regarded as an appropriate benchmark for determining the normal costs of a company offering an early retirement scheme for around 5 000 to 6 000 employees who did not enjoy the special permanent employment status.

#### c. *The final cost of the VRS*

(46) Furthermore, the Commission expressed fears that there was a risk that the financial contribution by the Greek State, which is not fixed but will depend on the value of OTE shares at the date of the actual transfer, would exceed the thus calculated alleged extra costs to OTE.

#### d. *Labour-related and other advantages resulting from the legacy of the past*

(47) The Commission also considered that even if one were to accept that OTE bears additional costs due to the special employment status of its employees, this would not necessarily justify the State's contribution, given that OTE might have benefited, and may continue to benefit, from other advantages which could neutralise any possible structural disadvantages. Such advantages could result from the specific employment status of OTE employees, the specific legal framework applicable to OTE or specific interventions, reducing OTE's labour costs below the labour costs of companies subject to the generally applicable labour laws. References were made to a possible exemption of OTE from unemployment contributions and a relief in the past from its pension obligations.

(48) Finally, the Commission also questioned whether OTE derives benefits from its former monopoly position compensating for the disadvantages resulting from the extra costs of the VRS, in particular as regards its fixed telecom network.

### IV. COMMENTS FROM INTERESTED PARTIES

(49) Comments were submitted by a law firm which has also asked for anonymity since it is involved in litigation against OTE on behalf of other operators. The law firm's main arguments can be summarised as follows.

(50) First, the Greek State's contribution does not fulfil the requirements of the private investor principle since the VRS was never submitted to OTE shareholders for approval. The Greek authorities had also failed to show that they could expect a reasonable return from the contribution at issue. Second, it appears that every year the State covers part of the deficit of OTE's social security fund, TAP-OTE. Third, with regard to OTE's former monopoly advantages, the law firm takes the view that the independence of the national regulatory authority is undermined since its board is appointed by the Greek authorities, i.e. the majority shareholder of OTE.

(51) According to the law firm, the regulatory authority has yet to issue decisions in cases involving alleged infringements by OTE for fear of undermining the company's financial position. OTE is not subject to advertisement tax (the *aggeliosimo*), which amounts to 20 % of the advertisement's placement fee and which all other companies pay for advertising on any medium. The value of this subsidy is estimated at EUR 20 million per year. Finally, through control of the public fixed line network, OTE has engaged in a series of anticompetitive and abusive practices in the electronic communications markets that have not always been remedied by the regulatory authority.

(52) The law firm accordingly requests that the aid be subject to conditions that address the above issues.

#### V. THE REPLY BY THE GREEK AUTHORITIES

(53) The Greek authorities reiterated their main argument that, in line with the *Combust* judgment, the contribution of the Greek State to the costs of the VRS does not confer any economic advantage on OTE, first because the contribution does not mitigate the normal employment-related budgetary burdens of OTE, and second because it covers solely the removal of a structural disadvantage of a former public undertaking. The Greek authorities consider in particular that the permanent status of OTE employees constitutes a major burden for the company and a structural obstacle for its further privatisation<sup>(15)</sup>. Where the State's contribution

<sup>(15)</sup> According to the Greek authorities, the permanent status has further adverse effects on the company's overall labour structure. Not only are salaries set by law at high levels, but their structure removes incentives for employee development and increased productivity since, given the legal prohibition, salaries cannot be raised. Moreover, new staff cannot be taken on at middle and senior management level since all new recruits have to be assigned to entry-level posts. Neither can new recruits assume any kind of management function since this would undermine the career progression guaranteed by the permanent status to existing staff. None of these restrictions apply to private operators.

cannot be justified as compensation for a structural disadvantage or be considered to fulfil the requirements of the private investor principle, the contribution could still be deemed compatible under Article 87(3)(c) of the Treaty on the basis of the principles derived from the *EDF* decision<sup>(16)</sup> and those applicable to the stranded costs in the energy field<sup>(17)</sup>.

(54) In their reply the Greek authorities submitted a number of reports drawn up by independent experts that have been used to (a) calculate and certify the overall cost of the VRS (KPMG has audited OTE's 2005 financial results and certified the total cost of the VRS), (b) calculate the cost of permanency and the cost of higher salaries for OTE's employees by using the appropriate benchmark in Greece (CRA International and the Hay Group undertook the relevant studies), and (c) describe the labour regulatory framework in Greece applicable to private undertakings in general and to OTE in particular (study by Mr Levantis, professor of labour law at the University of Athens). The Greek authorities' main line of argument can be summarised as follows.

#### a. *The necessity for a VRS*

(55) In response to the Commission's reservations as to whether other means could have been used to restructure OTE, the Greek authorities underlined that the Greek Constitution provides explicitly for the protection of labour rights deriving from collective employment agreements in force. Thus, a mandatory redundancy scheme that might have been imposed by law in order to put an end to the permanent status of OTE employees could not be implemented, for it would inevitably result in numerous lawsuits on constitutional, labour and social security law grounds, thus defeating the whole objective of the restructuring of OTE personnel<sup>(18)</sup>.

<sup>(16)</sup> Commission Decision of 16 December 2003 on the State aid granted by France to EDF and the electricity and gas industries (OJ L 49, 22.2.2005, p. 9).

<sup>(17)</sup> See Commission's Communication relating to the methodology for analysing State aid linked to stranded costs, at [http://ec.europa.eu/comm/competition/state\\_aid/legislation/stranded\\_costs\\_en.pdf](http://ec.europa.eu/comm/competition/state_aid/legislation/stranded_costs_en.pdf)

<sup>(18)</sup> In this respect, the Greek authorities have further stated that the new legislation which came into force in December 2005 (Greek Law No 3429/2005) with regard to wholly or partially state-owned enterprises provides for the removal of the permanent status for new recruits only. However, with regard to existing employees who enjoy permanent status, given that the legislation does not affect the permanent status of existing employees, OTE had no alternative other than to implement a VRS.

b. *The costs of the VRS*

(56) In their reply, the Greek authorities confirmed that out of 6 070 eligible employees, OTE finally received applications from 5 494 employees (91 % take-up). The beneficiaries of the VRS are further divided in two sub-groups: (a) 4 859 who will qualify for the recognition of 'notional' years — this group is covered by the present VRS — and (b) 635 employees who are close to retirement (i.e. who are entitled to full pension rights but who have not reached the mandatory retirement age) who will receive supplementary retirement incentives to leave<sup>(19)</sup> — this group is covered by the 'regular' VRS.

(57) The overall nominal costs of the VRS have been audited and verified by KPMG, the auditors of OTE. These are the costs audited in OTE's 2005 International Financial Reporting Standards (IFRS) Statements<sup>(20)</sup>. Part of the VRS cost, i.e. the cost of the one-off VRS payments, has been calculated by Prudential, an independent employee benefits consulting firm. Prudential carried out an actuarial study pursuant to Article 74 of Law No 3371/2005. The Greek authorities further commissioned a report by a global management consultancy, the Hay Group, which confirmed that the legal redundancy compensation package factor of 1,5 times was a reasonable benchmark for calculating the compensation package that an undertaking would under normal circumstances offer its employees to leave the company.

(58) Based on the above Hay Group report, another international economics and antitrust consultancy, Charles River Associates International (CRA International), compiled a final report in which it calculated the extra costs incurred by OTE as compared to its private sector competitors, i.e. the cost of permanency and the cost of higher salaries.

(59) The main findings of the individual reports can be summarised as follows.

<sup>(19)</sup> For these employees, because the pension received under the VRS would equal their current salary, the scheme is less attractive compared with employees who have not reached the top of the salary scale (the latter will receive a pension exceeding their current salary because their pension is calculated based on the projected salary achieved if they continued working during the notional years). In order to ensure maximum participation in the VRS, an extra incentive to leave is therefore provided to employees having already reached the top of OTE's salary scale.

<sup>(20)</sup> It should be recalled that from 2005, all publicly-traded EU companies are required to prepare their consolidated accounts using the IFRS. See Commission Regulation (EC) No 1725/2003 of 29 September 2003 adopting certain international accounting standards in accordance with Regulation (EC) No 1606/2002 of the European Parliament and of the Council (OJ L 261, 13.10.2003, p. 1).

c. *The KMPG 2005 IRFS Certificate: the nominal value of the VRS*

(60) According to OTE's certified accounts for 2005, the estimated total cost of the VRS in terms of payments amounts to EUR 1 161 827 920. The net present value (NPV) of the VRS is estimated at EUR 939 607 196<sup>(21)</sup>. This sum is the result of reducing the nominal value of the VRS using a discount rate of 3 %, which reduces the nominal amount by EUR 67,7 million<sup>(22)</sup>, and excluding the sum of EUR 154,4 million which relates to indemnities that have already been provisioned for in the 2004 financial accounts of OTE (1 161,8 – 67,7 – 154,4 = 939,6). The certified NPV of the VRS (EUR 939,6 million) does not, however, take account of the tax benefits accruing to OTE under the corporate tax law (see below the CRA report).

d. *The Hay Group report: comparisons with other VRSs in Greece and the EU*

(61) The Hay Group report collected data from various companies in Greece and in the rest of Europe that had experienced a downsizing process over the past years. It surveyed more than 40 different organizations that are Greek-owned or local operations of multinational companies. The Hay report confirms the assumptions made by the Greek authorities in its earlier submissions, namely that: (a) there is no early retirement scheme in Greece or elsewhere in Europe that is comparable to OTE's (that is, a VRS that accommodates 'structural' costs like those of OTE, such as permanency and fixed high salaries), and (b) the average severance packages in the case of a normal VRS undertaken by a private company are indeed 1,5 times the indemnity provided by law, in particular as regards the age group of 51 years<sup>(23)</sup>.

e. *The CRA report: calculating OTE's extra costs*

(62) On the basis of the above studies, CRA International has calculated the NPV of the costs that OTE will incur for a total of 5 494 employees as a result of implementing the VRS.

<sup>(21)</sup> The NPV represents the market value of the VRS, i.e. the amount that OTE would have to pay to a third party if this third party took over OTE's obligations accruing from the VRS.

<sup>(22)</sup> It should be recalled that in their earlier submission on 20 December 2005, the Greek authorities, at a time when the nominal VRS was estimated at EUR 1 161,0 million, had calculated the NPV of the VRS at EUR 863 million using as a discount rate OTE's WACC (weighted averaged cost of capital) estimated at 7,83 %.

<sup>(23)</sup> See footnote 13.



- (63) In computing the NPV of the VRS a key issue was the use of an appropriate discount rate. CRA International acknowledges that a fundamental principle of modern finance is that the discount rate applied to any stream of cash flow should reflect the level of systematic risk inherent in the cash flow stream. According to CRA International, it is appropriate to use the company's weighted average cost of capital (WACC), which is used by economists in most cases <sup>(24)</sup>.
- (64) However, CRA International takes the view that in the present case, the contribution of systematic costs to the costs arising from the VRS is small to insignificant. This is because (a) the evolution of salaries of OTE employees follow a strict scale that significantly reduces the uncertainties about salary variations over time, and (b) any uncertainty that may persist is not correlated to OTE's performance (the annual increase in the salary grid is not correlated to OTE's overall economic performance). Thus, according to CRA International, the appropriate discount rate should reflect the available return on risk-free securities. Taking as an example the ten-year, EUR 2,1 billion bonds auctioned by the Greek authorities on 7 June 2005 (the year of the VRS) at a weighted average yield of 3,41 %, and the five-year, EUR 1,68 billion bonds auctioned a month later at a weighted average yield of 2,71 %, CRA International takes the spot risk-free interest rate for all maturities to be about 3 % <sup>(25)</sup>.
- (65) Based on these assumptions, CRA International has estimated the NPV of the VRS at EUR 1 086,2 million. Contrary to KPMG calculations (see recital 60 above), CRA International calculations do not take into consideration the EUR 154,4 million already provisioned by OTE in its 2004 accounts, since they are not bound by the accounting constraints of an auditor. Moreover, given that all the VRS payments by OTE are deductible for corporate tax purposes under Greek corporate law, CRA International has estimated that the real NPV of the VRS stands, post-tax, at EUR 784,3 million <sup>(26)</sup>.
- (66) On the basis of the above post-tax amount, CRA International calculated the costs that OTE would have incurred had it been a private company. To this end, CRA International assumed that (a) according to the conclusions drawn by the Hay Group report, a private company would under normal circumstances offer a package amounting to 1,5 times the legal redundancy indemnity, and that (b) according to the data presented in the 2004 KPMG survey of compensations and benefits in the Greek high tech sector, this percentage would apply to salaries which are 33 % lower than those paid by OTE. Based on the assumption that OTE would provide a package equal to 150 % of the legal requirement but with private-sector salaries, i.e. 33 % lower than those of OTE, CRA International concluded that a private company other than OTE would have incurred costs, after tax, amounting to EUR 314,4 million for implementing the VRS.
- (67) Based on a comparison of the post-tax present value (PV) of the VRS (EUR 784,3 million) with the costs that OTE would have incurred had it been an ordinary private company (EUR 314,4 million), CRA International has calculated that the extra costs borne by OTE for the implementation of its VRS amount to EUR 469,9 million <sup>(27)</sup>.
- (68) For the sake of completeness, CRA International also calculated the extra costs borne by OTE on the basis of two alternative scenarios. The first scenario is based on the higher OTE WACC discount rate (7,8 %). Under this scenario, the extra burden is reduced to EUR 390,4 million. The second scenario assumes that there is no tax deductibility. Under this scenario, the extra burden increases to EUR 540,2 million when using the OTE's WACC, and to EUR 643,4 million when using the risk-free discount rate of 3 %.
- f. Absence of labour-related or other advantages*
- (69) On the basis of a study carried out by Prof. Levantis of the University of Athens, the Greek authorities stress that that OTE does not benefit from any labour-related advantage. More particularly, the Greek authorities confirm that OTE is not exempted from payment of unemployment contributions <sup>(28)</sup>. In any event, in connection with the *Combust* judgment, the Greek authorities argue that the existence of structural advantages was not part of the Court's analysis, and neither were they part of the Commission's assessment of the compatibility of the aid granted by France to EDF.

<sup>(24)</sup> This was also the approach taken by the Greek authorities in their submissions of 4 November 2005.

<sup>(25)</sup> In this respect, CRA International is in line with the certified accounts of OTE by KPMG, which also used a discount rate of 3 %.

<sup>(26)</sup> Having only the responsibility to verify OTE's pre-tax accounts, KPMG did not need to calculate the post-tax NPV of the nominal VRS.

<sup>(27)</sup> These extra costs are broken down as follows: burden to OTE of the permanent status: EUR 322,9 million, and burden to OTE of higher salaries: EUR 147,0 million.

<sup>(28)</sup> According to the Greek authorities, OTE, like all other private companies, pays compulsory employer's unemployment contributions as required under the applicable social security legislation. This amounts to 2,76 %, while an additional 1,33 % is paid by the employee.

(70) With regard to advantages that OTE may derive from its former monopoly position, the Greek authorities recall that the fixed line market has been fully liberalised since 2001, and that OTE has been the subject of extensive *ex ante* regulation in accordance with the provisions of the applicable regulatory framework for electronic communications services and networks. The remedies imposed on OTE by the national regulatory authority, the Hellenic Telecommunications and Post Commission (EETT), in relation to the fixed markets have led to competitive entry from alternative operators and the subsequent loss of market share by OTE.

g. *The undertaking offered by the Greek authorities*

(71) In their reply, the Greek authorities based their calculations on OTE's share price at close of trading on 25 April 2006, namely EUR 17,98. Thus, on 25 April 2006, 4 % of the stock of OTE corresponded to a stock value of EUR 353 million. The value of the Greek State's contribution to the VRS, as of 25 April 2006, was therefore 25 % lower than the amount of EUR 469,9 million that corresponds to the extra cost of the VRS.

(72) However, given that the price of OTE shares is subject to fluctuation on the Athens Stock Exchange, if the total value of the 4 % of OTE's stock exceeds the extra costs borne by OTE, Greece expressly undertakes to amend Article 74 of Law No 3371/2005, so as to limit the State's financial contribution accordingly.

h. *Reply to third-party comments*

(73) The Greek authorities underline that in accordance with Article 34 of Greek Company Law No 2190/1920, the general meeting does not have the competence to adopt management decisions; such competence is vested in the board of directors (Article 9(d) of OTE's statutes). The VRS was thus discussed and decided by the company's board of directors and later presented to institutional investors.

(74) The Greek authorities argue that the comments made about the fact that every year the Greek State covers part of the deficit of TAP-OTE are based on an incorrect understanding of Greece's social security system. The Greek authorities reiterate that the main pension fund for OTE employees, TAP-OTE, is a separate legal entity, governed by public law, in the same way as all other pension funds in Greece. It has its own board of directors, administration, budget and finance departments. Almost all existing pension funds are public law funds, and are independent from the companies in which the employees work, are self-governed and not profit-oriented. Pension rights are vested rights under the Greek Constitution (Article 25). The basic characteristics of the Greek social security system are its obligatory, public and universal character. The Greek pension system is thus a 'pay as you go'

system. Deficits of the various public law funds are not financed by the employers or the employees, but by the State, the latter being under the constitutional obligation to guarantee that all pensions are fully paid.

(75) From 1994 until 2001, although a private law company under state control and totally independent from the public law pension fund TAP-OTE, OTE was mandated through *ad hoc* legislation and through collective labour agreements to cover the deficit of TAP-OTE, and thus to operate a kind of a social insurance arrangement on behalf of the State. OTE's liability to cover such *ad hoc* deficits of TAP-OTE increased yet further its non-wage costs compared to its competitors and new entrants in the market and constituted a clear disadvantage for the company.

(76) With regard to the alleged advantages that OTE derived from its former monopoly position, the Greek authorities emphasise that since 2001, the Greek telecommunications market has been fully liberalised and subject to the *ex ante* regulatory supervision of EETT, the national regulatory authority. The alleged abusive behaviour of OTE would have to be dealt with under the respective sector-specific rules of the new regulatory framework and the relevant directives thereof. For the Greek authorities, compensatory measures that pertain to a fully liberalised market cannot be requested through a completely different avenue, i.e. the State aid assessment of state measures which are solely labour-related.

(77) Finally, the Greek authorities reject as incorrect the third party's allegation that OTE is exempt from the advertisement tax, whereas other companies in Greece are liable to pay it. Although, according to Article 19(2) of Law No 1264/1982, public undertakings or utilities (like OTE) are exempt from the payment of the advertisement tax, a recent judgment by the Administrative Court of First Instance (Decision No 9564/2005) has interpreted the notions of 'public service' and 'utilities' in Law No 1264/1982 as meaning that not only OTE but every telecommunications operator is exempt from the advertising tax<sup>(29)</sup>, irrespective of its status as a public or private company<sup>(30)</sup>.

<sup>(29)</sup> The Greek authorities also state that Article 24 of the recent Law No 3470/2006 clearly provides that OTE and other telecom service providers no longer enjoy a specific status that gives them the right to be exempted from the advertising tax. Pursuant to Law No 1264/1982, public companies or utilities are exempted from the advertising tax only if their share capital belongs by absolute majority to the Greek State. Accordingly, OTE and all other telecom providers are now liable to pay the advertisement tax.

<sup>(30)</sup> According to the Greek authorities, the Administrative Court concluded that the characterization of a company as a public utility does not relate to its legal status, or to the legal framework within which it operates, but depends solely on the nature of the services it provides. Therefore, according to the Court, undertakings offering goods and services deemed vital for society, such as telecommunications, water supply and energy, constitute utilities.

## VI. ASSESSMENT OF THE AID

## Existence of the aid

- (78) Article 87(1) of the EC Treaty provides that any aid granted by a Member State or through state resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings, insofar as it affects trade between Member States, is incompatible with the common market.
- (79) The classification of a national measure as State aid presupposes that the following cumulative conditions are met: (a) the measure is granted by a Member State from state resources in whatever form; (b) the advantage is selective; and (c) the measure distorts or threatens to distort competition and is capable of affecting trade between Member States.
- (80) In the present case it is not disputed that to the extent that the State proposes to transfer to TAP-OTE 4 % of its shareholding in OTE as a contribution towards the overall costs of the company's VRS, state resources are involved in the measure. The holding by the State of 4 % of OTE's shares constitutes an asset with financial value. This asset is transferred without any compensation at the market price. As a result, the measure is a transfer of state resources.
- (81) Moreover, although the direct recipient of the aid is TAP-OTE — a public law pension fund which is part of the wider social security system of Greece — the real beneficiary of the measure is OTE, in that the company is relieved of part of its social security obligations resulting from the VRS in question. No other company enjoys that particular advantage. As a result, the measure is selective in nature.
- (82) Neither is it contested that, OTE being a nationwide network operator engaged in the provision of electronic communications networks and services including the provision of international electronic communications services, any aid granted is capable of affecting trade between Member States.
- (83) However, as to the question whether this state contribution confers an advantage on OTE which distorts or threatens to distort competition, the Greek authorities have argued (a) that they have acted as a private investor, and (b) that the measure does not grant an advantage to OTE since it merely provides compensation for the structural disadvantages of the latter due to the *de facto* permanent employment status of its employees and the higher salary costs imposed on it by law during the pre-liberalisation period.

## a. Compliance with the private investor principle

- (84) In line with the requirements arising from the case-law, in order to determine whether the Greek State's financial contribution towards the costs of OTE's VRS can be regarded as being in line with the behaviour of a private investor acting under normal market conditions, it is necessary to consider whether in similar circumstances a private investor of a size comparable to that of the State might have provided a similar financial contribution, namely the equivalent of 4 % of OTE's shares <sup>(31)</sup>.
- (85) In that respect, a distinction must be drawn between the obligations which the State must assume as the owner of the share capital of a company and its obligations as a public authority <sup>(32)</sup>. OTE being a public limited company, the Greek State as the majority owner of the share capital of the company would have been liable for the debts of the company only up to the liquidation value of its assets. Social security and other labour-law-related liabilities are normally for the company concerned to bear, not for its shareholders. Furthermore, it should be stressed that OTE is not a company which is currently in a difficult financial situation or unable to meet on its own the financial liabilities of the VRS.
- (86) Therefore, the obligations arising from the cost of the early retirement redundancies and the payments of any other associated employment benefits cannot be taken into consideration for the purpose of applying the private investor principle <sup>(33)</sup>.
- (87) Moreover, no shareholder other than the Greek State has contributed to the extra costs of the restructuring plan of OTE, although the expected improved profitability of OTE should benefit all investors without distinction. In these circumstances, the behaviour of the Greek State was different from that of the other private investors in OTE. Even if the special position of the State as the largest shareholder might justify different behaviour, one would normally expect that where one of the shareholders of a company provides financial assistance without the other shareholders doing so in the same manner, such a shareholder would receive some sort of compensation by way of an increased stake in the company or suchlike. However, in the present case, the State receives no compensation in excess of that of all the other investors in the company.

<sup>(31)</sup> Case C-305/89 *Italy v Commission* [1991] ECR I-1603, paragraph 19.

<sup>(32)</sup> Joined Cases C-278/92, C-279/92 and C-280/92 *Spain v Commission* [1994] ECR I-4103, paragraph 22.

<sup>(33)</sup> Case C-305/89, loc. cit., paragraph 22.

(88) The fact that the share price of OTE has increased since the announcement of the VRS does not necessarily mean that the State's financial contribution should be considered, for this reason alone, compatible with the private investor principle. In principle, any financial contribution by the State towards improving the financial position of a quoted company is likely also to improve the latter's share price, and this regardless of whether such a contribution qualifies as aid within the meaning of Article 87(1) of the Treaty.

(89) For all the above reasons, the argument of the Greek authorities that the State's contribution to the costs of the VRS complies with the private investor principle should be rejected.

#### b. Absence of an economic advantage

(90) According to settled case-law, the concept of aid encompasses advantages granted by public authorities which, in various ways, mitigate the charges which are normally included in the budget of an undertaking<sup>(34)</sup>. The Court of Justice has held in this respect that a partial reduction of social charges devolving upon an undertaking constitutes aid within the meaning of Article 87(1) of the Treaty if that measure is intended partially to exempt that undertaking from the financial charges arising from the normal application of the general social security system, without there being any justification for this exemption on the basis of the nature or general scheme of this system<sup>(35)</sup>.

(91) The Greek authorities contest that the partial reduction of OTE's costs of the VRS confers an advantage on the company, and has an impact on competition, on the grounds that it frees OTE from a structural disadvantage and ensures that the company will be subject to the same, less burdensome, labour law arrangements as any other company in the Greek electronic communications market. In this regard, the Greek authorities have relied on the *Combus* judgment delivered by the Court of First Instance. In that case, the Court stated that a (State) measure which was 'introduced to replace the privileged and costly status of the officials employed by *Combus* with the status of employees on a contract basis comparable to that of employees of other bus transport undertakings competing with *Combus*' did not constitute aid, for 'the intention [of the Danish government] was

thus to free *Combus* from a structural disadvantage it had in relation to its private-sector competitors'<sup>(36)</sup>.

(92) In this regard, it should be noted that the finding in *Combus* has not been confirmed by the Court of Justice. Certain judgments of the Court of Justice tell against the assumption that the provision of compensation for a structural disadvantage means that a measure cannot be categorised as aid. In its settled case-law, the Court of Justice has decided that the extent to which a measure constitutes aid must be determined according to the effects of the measure and not by reference to its causes or aims<sup>(37)</sup>. The Court has also decided that any measure exempting an undertaking from the charges which are normally included in its budget constitutes State aid<sup>(38)</sup>. The Court has made clear that this includes, for example, the costs linked to employee pay<sup>(39)</sup>. In the light of these considerations, the Court has rejected the notion that a measure does not give an advantage to the undertaking solely because it compensates some disadvantage which the undertaking has suffered in the past<sup>(40)</sup>.

(93) It is true that the labour law applicable to OTE is different from that applied to any other private company in Greece, in that the permanent tenure of OTE employees and their higher salaries cannot be modified unless new legislation is passed giving effect to the consent required of OTE's employees. Overall, the labour rules applicable to OTE increase its labour and social security costs and deprive the company from the freedom enjoyed by other competing companies when it comes to restructuring their labour costs in line with the prevailing market conditions.

(94) In this regard, the present case bears a number of similarities with *Combus*. In *Combus*, the Danish State did not compensate the company concerned but the officials employed by it. Likewise, the Greek State is not compensating OTE but the employees' pension fund for the loss of revenue due to early retirement. Like in *Combus*, the permanent status of OTE's employees constitutes a 'privileged and costly status' vis-à-vis the status of private-sector employees. Like in *Combus* the intention of the Greek Government is to free OTE 'from a structural disadvantage it ha[s] in relation to its private-sector competitors'.

<sup>(36)</sup> Case T-157/01, loc. cit., recital 57.

<sup>(37)</sup> Case 173/73 *Italy v Commission* [1974] ECR 709, paragraph 13; Case C-310/85 *Deufl* [1987] ECR 901, paragraph 8; Case C-241/94 *France v Commission* [1996] ECR I-4551, paragraph 20.

<sup>(38)</sup> Case C-387/92 *Banco Exterior* [1994] ECR I-877, paragraph 13; Case C-241/94 *France v Commission* [1996] ECR I-4551, paragraph 34.

<sup>(39)</sup> Case C-5/01 *Belgium v Commission* [2002] ECR I-1191, paragraph 39.

<sup>(40)</sup> Case C-30/59 *Gezamenlijke Steenkolenmijnen* [1961] ECR 3, paragraphs 29 and 30; Case 173/73 *Italy v Commission* [1974] ECR 709, paragraphs 12 and 13; Case C-241/94 *France v Commission* [1996] ECR I-4551, paragraphs 29 and 35; Case C-251/97 *France v Commission* [1999] ECR I-6639, paragraph 40 and 46-47; see also Case T-109/01 *Fleuren Compost* [2004] ECR II-127, paragraph 54.

<sup>(34)</sup> See, *inter alia*, the judgments in Case 30/59 *De Gezamenlijke Steenkolenmijnen in Limburg v High Authority* [1961] ECR 1; Case C-387/92 *Banco Exterior de España* [1994] ECR I-877, paragraph 13; Case C-241/94 *France v Commission* [1996] ECR I-4551, paragraph 34; and Case C-256/97 *DM Transport* [1999] ECR I-3913, paragraph 19.

<sup>(35)</sup> Case 173/73 *Italy v Commission* [1974] ECR 709, recital 15; to the same effect, judgment in Case C-301/87 *France v Commission* [1990] ECR I-307, recital 41.

- (95) Furthermore, as was the case in *Combust*, the State's intervention does not aim to make up for, or alleviate OTE from, its past pensions obligations resulting from the period of time when the company became subject to a *sui generis* labour law framework (past liabilities), but is strictly limited to putting OTE in line with the private sector for its future pension rights.
- (96) That being said, the Commission also notes that the factual and legal context of the case at hand exhibits a number of particularities compared with *Combust*.
- (97) First, in *Combust* the Danish authorities' compensation aimed to facilitate the planned change of status of the company from public to private, hence the financial compensation (bonus) offered by the Danish Government to *Combust* employees whose status changed from public servants to private-law contract employees. OTE, however, became a public limited company in 1994, without the State taking any appropriate measures at the time to ensure that the company's labour rules would be aligned on those of a normal public limited company. Nor did the State intervene in 2001, when OTE lost its exclusive right to provide fixed voice telecommunications services and the Greek electronic communications market was fully liberalised.
- (98) In this respect, it is not impossible that the high number of employees enabled OTE, especially during the critical years before and immediately after full liberalisation, to secure and maintain its current dominant position and continue to be present in virtually all segments of the electronic communications market.
- (99) Moreover, as stated in recital 93, the concept of aid in Article 87(1) of the EC Treaty covers only measures which lighten the burdens normally assumed in an undertaking's budget and which are to be regarded as an economic advantage which the recipient undertaking would not have obtained under normal market conditions <sup>(41)</sup>.
- (100) In this respect, it should be recalled that according to the case-law, the costs for undertakings that arise from collective agreements concluded between employers and trade unions, which undertakings are bound to observe, either because they have acceded to those agreements or because those agreements have been extended by regulation, are costs that are included, by their nature, in the budgets of undertakings <sup>(42)</sup>.

<sup>(41)</sup> Case 173/73 *Italy v Commission* [1974] ECR 709, paragraph 26; Case C-387/92 *Banco Exterior de España* [1994] ECR I-877, paragraphs 12 and 13; and Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-9919, paragraph 84, and the judgments cited therein.

<sup>(42)</sup> Case C-482/99 *France v Commission* [2002] ECR I-4397, paragraph 40.

- (101) Although, as pointed out in recital 93, the labour rules imposed on OTE are indeed an exception to the ordinary labour law applied to date to any other private company in Greece, and the permanent status and the high salaries guaranteed to OTE employees were not in reality the result of a freely negotiated collective agreement, but rather imposed on the company by the State itself, the Commission notes that at no time since OTE became a listed company did the Greek authorities indicate that OTE's labour law liabilities did not have to be assumed by the company's normal budget or that the State would have to compensate OTE for the extra costs of permanency and high salaries imposed by law on it. Likewise, OTE's stock valuation was also based on the assumption that the permanency and high salary costs of OTE are normally for OTE's budget to bear.
- (102) These considerations, examined in conjunction with the findings in the *Combust* case, indicate that the measure at issue can be regarded as aid. However, the matter does not need to be pursued further since, for the reasons set out in detail below, it is in any event compatible with the common market under Article 87(3)(c) of the Treaty.

#### VII. COMPATIBILITY OF THE AID WITH THE COMMON MARKET

- (103) The Commission notes that the planned contribution of the State to the costs of the VRS of OTE is part of wider plan of the Greek authorities to restructure the employment regime applicable to OTE so as to guarantee its long term viability and to improve the functioning of the electronic communications market. The VRS is thus a necessary step towards the further privatisation of OTE.
- (104) The Commission therefore considers that the assessment of the compatibility of the measure with the common market needs to be based directly on Article 87(3)(c) of the EC Treaty which states that: 'aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest' may be considered to be compatible with the common market.
- (105) For an aid measure to be considered compatible with the common market on the grounds that it facilitates the development of economic activities or certain economic areas, it must improve the way the economic activity is carried out. Aid is compatible under Article 87(3)(c) only where it does not adversely affect trading conditions to an extent contrary to the common interest. In carrying out its assessment, the Commission pays particular attention to the criteria of necessity and proportionality <sup>(43)</sup>.

<sup>(43)</sup> Case T-187/99 *Agrana Zucker und Stärke AG v Commission* [2001] ECR I-1587, paragraph 74.

a. *The measure is in line with the common interest*

- (106) By relieving OTE from the extra costs it bears as a former public undertaking due to the permanent employment status and the high salaries of its staff, the notified measure will enable the company to operate freely in the fully liberalised electronic communications market and to make the necessary adjustments to respond to market and other technological developments that affect the company's viability in the long term.
- (107) In particular, the reduction of around one third of OTE's staff through the VRS, together with the consent of OTE employees to abolish permanency for future recruits in exchange for the early retirement package offered by OTE, are key components of the overall restructuring operations of OTE that should guarantee the company's profitability, efficient operations and further privatisation. To date, the permanent employment status of OTE employees, their excessive number and the fixed salary regime applied to them constitute major obstacles to the further privatisation of the company and to the exit of the Greek State from OTE.
- (108) The ongoing transformation of OTE from an ex-monopolist to a company that is subject to the same legal framework as any other private operator in Greece, with the subsequently envisaged relinquishment by the Greek State of its control over the company, improves the operation of the Greek electronic communications market, lowers the barriers to entry and exit in the market<sup>(44)</sup> and is beneficial in the longer term to end-users.
- (109) Therefore the planned financial contribution of the Greek State to the costs of the VRS is in line with the common interest.

b. *The aid is the appropriate instrument*

- (110) At the opening of the formal investigation, the Commission expressed reservations as regards the need for the present VRS by reference to other previous VRSs that were financed entirely by OTE.

<sup>(44)</sup> These obstacles are due to the fact that entry to the Greek electronic communications market through the acquisition of OTE is prevented, to date, by the extremely inflexible employment conditions applied in OTE and by the fact that OTE employees enjoy a *de facto* permanent status, which prevents OTE from being taken over by other business groups. On the other hand, and for the same reasons, exit from the market, in the form of a relinquishment by the State of its control, seems at present extremely unlikely.

(111) In particular, the investigation showed that since 1996 and up to 2004, OTE allowed 8 173 employees to retire early. However, these smaller annual VRSs (900 employees on average each year) were offered only to employees who were already entitled to a pension but could still continue to work until the conditions for mandatory retirement were met<sup>(45)</sup>. Accordingly, these past VRSs did not involve the recognition of any notional years to the employees concerned, and therefore cannot be compared to the present VRS as far their structure and scope are concerned. In that sense, the previous VRSs implemented by OTE were no different from equivalent VRSs implemented by any other private company or OTE's current 'regular' VRS<sup>(46)</sup>.

(112) In the present case, a VRS which would have merely offered early retirement only to employees who were entitled to a pension but had not yet reached the mandatory retirement age would not have led to the highest possible take-up since a number of eligible employees would still have preferred to remain in employment in order to receive the maximum possible pension<sup>(47)</sup>.

(113) In these circumstances, the decision of OTE to recognise up to seven notional years of service to all employees who would have been subject to mandatory retirement between 2005 and 2012, and thus offer them an early retirement option with a full pension, appears to have been the only means likely to lead to the timely release of a significant number of employees. An employee that enjoys a quasi-civil-servant status would decide to exit the company only if the employer offered the appropriate incentives to that effect. OTE needed therefore to offer at least adequate compensation for the economic benefits that an employee would have continued to enjoy had he stayed under the protection of permanency. The subsequent successful take-up of the VRS (around 91 % of all eligible employees) confirms that the further incentives offered by OTE to its employees in the form of recognised notional years of service is an appropriate instrument.

<sup>(45)</sup> For instance, employees with 30 years of service (right to a pension) could continue to work until they reached the age of 58 or completed 35 years of service, whichever happened first. Such employees would rather choose to continue working until mandatory retirement in order to increase the calculation base of their pension. As the Greek authorities pointed out, salaries grow at a higher rate than pensions, and OTE employees generally prefer to continue working for the company since pensions are calculated by reference to the last salary.

<sup>(46)</sup> As mentioned in recital 56, the 'regular' VRS concerns only employees who have already acquired pension rights but have not yet fulfilled the conditions for mandatory retirement. The regular VRS does not involve 'notional' years and therefore its costs are not covered by the Greek State's contribution.

<sup>(47)</sup> See footnote 34.

- (114) OTE could not have gone back to resorting to other less costly measures such as a redundancy plan, since OTE employees would have to consent to losing their life tenure employment status in exchange for a lower redundancy compensation. Nor could it have abolished retroactively the permanent status of its employees in order to be able to carry out a mandatory redundancy scheme since, as the Greek authorities explained, such an option would have raised very serious legal and constitutional issues that would have defeated the whole restructuring of OTE.
- (115) Moreover, an analogy could be drawn between the present case and the Commission's Communication on stranded costs in the energy sector<sup>(48)</sup>. Stranded costs arise when the incumbent retains costs associated with being an incumbent supplier but is no longer able to recuperate them because new competitors are now servicing the market as a result of liberalisation.
- (116) Thus, the Greek State's contribution to the VRS could by analogy be treated in a similar manner as the compensation for stranded costs, for the following reasons. The special permanent status of OTE's employees is linked to the previous monopoly situation where the market was not yet liberalised. This special regime did not give rise to any difficulty as long as OTE operated in a monopoly environment. OTE incurred higher costs as compared to others, but it was shielded from any intra-industry competition. Since the liberalisation of the Greek telecommunications market, this specific employee arrangement has gradually become a burden for OTE, affecting its competitiveness. The specific permanency of the employees, i.e. the quasi-civil-servant status, represents an additional wage cost for OTE that its competitors do not have to bear<sup>(49)</sup>.
- (117) Accordingly, the decision of the Greek authorities to finance the costs of the VRS that result from the permanency costs and the high salaries of OTE is in line with the necessity requirement, for it enables OTE to restructure its operations in a manner similar to that of a private company without having to incur the extra costs that derive from the pre-liberalisation period.
- c. Proportionality*
- (118) The State's contribution compensates OTE only for the permanency and high salaries costs that arise from the extra notional years that are given to employees who would have reached the mandatory retirement age from 2005 to 2012. In particular, the Greek State does not intervene to finance the existing pension liabilities of OTE or to cover any sort of pension deficit that should have been assumed by the company. OTE has paid all its past employer contributions to TAP-OTE in full, and is also paying all the costs of the VRS, up to the effective date of the implementation of the VRS, with the exception of the costs that a private company would not have to bear had it had to take similar measures to reduce its workforce.
- (119) Thus, the Greek State is transferring 4 % of its stake in OTE into the pension fund in order to finance the costs of the VRS that result from the fact that the pensions of those eligible for the VRS are not calculated on the basis of the year of their actual departure, but on the basis of the year they would have retired had they chosen to take full benefit of their permanent status. In other words, the State is essentially financing the future employer and employee pensions that correspond to the notional years being awarded to those taking advantage of the VRS offer.
- (120) The State's contribution should also be assessed within the wider agreement reached by the management of OTE and its employees whereby in exchange for the generous incentives given for early retirement, OTE employees have consented to the abolition of the permanent employment status for future recruits. Had the employment status of OTE future employees remained unchanged, the State's contribution would not have had any effect on the company's long-term viability since any future recruits would have neutralised any short-term cost savings that OTE would have realised through the VRS.
- (121) The proportional character of the aid in question also depends on ascertaining first that (a) the Greek authorities have adequately quantified the extra costs that the OTE will have to bear because of the permanency and high fixed salaries of the personnel taking advantage of the VRS offer, and (b) that the State's contribution does not overcompensate OTE.

<sup>(48)</sup> See above, footnote 17.

<sup>(49)</sup> Reference should also be made to the Commission's decision in the *EDF* case (see footnote 16). In *EDF*, the Commission declared compatible a measure whereby the French State relieved enterprises in the French electricity and gas sectors of the payment of some of the specific pension rights the employees had acquired in the past, at a time when companies were operating under a legal monopoly. The Commission considered that at that time the companies were shielded from any intra-industry competition and could thus bear the higher pension rights without suffering any significant economic disadvantage. The Commission acknowledged that these 'past liabilities' represented a significant difficulty for these enterprises, once they were operating in competition with other electricity or gas enterprises that did not have to bear similar costs from the past (recital 143 of the Decision). The Commission regarded the aid granted 'with the view to such sectoral reorganization' as necessary and proportionate on the grounds that the other aspects of the sectoral reform did not involve any State aid (recital 146 of the Decision). Although in the present case the Greek State does not compensate OTE for past pension liabilities, nor is the measure aimed at a wider sectoral reorganisation, the principles laid down in *EDF* are applicable by analogy.

## i. The extra costs of OTE

- (122) On the basis of the detailed information submitted by the Greek authorities, the nominal costs of the VRS, as certified by KPMG in accordance with the certified IFRS Financial Statements of OTE for 2005, is EUR 1 161,8 million.
- (123) According to the study carried out by CRA International (see recital 65), the NPV of the VRS is EUR 1 086,2 million. Taking into account the tax benefits to OTE arising from the deductions to be made for corporate tax purposes, CRA International has estimated the post-tax NPV of the VRS at EUR 784,3 million.
- (124) CRA International has based the calculation of the NPV on a discount rate of 3 %, which corresponds to the return of risk-free securities. This approach contrasts with the November 2005 submissions of the Greek authorities which were based on the WACC of OTE, estimated at 7,8 %. CRA International does not deny that the WACC can be used as a discount rate. It considers, however, that while the use of the WACC reflects the usual risk to which a company is exposed in the course of its business, in the present case the payment of salaries and pensions to OTE employees is devoid of any uncertainty, for salaries follow a strict salary scale and their yearly 'upward' revision is not correlated to OTE's own economic performance. However, for the sake of completeness, CRA International also calculates the NVP of the VRS by reference to the WACC of OTE and concludes that the NPV of the VRS is EUR 704,8 million.
- (125) The Commission considers that an assessment based on the WACC of OTE (7,8 %) is in line with general practices in this area (as also acknowledged by CRA International itself) and with the Greek authorities' earlier submissions. Accordingly, the NPV of the VRS should be EUR 704,8 million.
- (126) Based on the assumption that OTE could provide an early retirement package equal to 150 % of the legal requirement for a redundancy, but with private salaries (in other words 33 % lower than those of OTE), CRA International concludes that the NPV of such a scheme would be EUR 314,4 million. It follows that the extra burden on OTE is EUR 390,4 million (EUR 704,8 – EUR 314,4 = EUR 390,4).
- (127) At the opening of the formal investigation, the Commission asked the Greek authorities to provide evidence for the proposition that private companies would have offered redundancy packages equal to 150 % of the minimum legal requirements. The Greek authorities submitted a report by the Hay Group (see

recital 61), which came to the conclusion that, although there had not been any kind of VRS in the EU comparable to that of OTE, based on interviews and information gathered by 40 companies operating in Greece, on average the redundancy package offered by private companies to employees aged 51 to 62 (the majority of OTE employees taking part in the VRS) was equal to 150 % the legal minimum requirement. Having examined the relevant information submitted by the Greek authorities, the Commission has no grounds to call into question the validity of the findings of the Hay report.

- (128) Therefore, the calculation by CRA International of the extra burden of OTE (EUR 390,4 million) based on the 1,5 multiplier suggested by the Hay report should be accepted as well-founded.

- (129) The next question that needs to be answered is whether the Greek State's contribution exceeds the extra burden for OTE, estimated at EUR 390,4 million.

## ii. The value of the Greek State's contribution

- (130) Pursuant to Article 74(4)(a) of Law No 3371/2005, the Greek authorities contribute 4 % of the share capital of OTE to TAP-OTE. The value of the Greek State's contribution to the VRS is calculated by multiplying the total number of shares of OTE (490 582 879) by 4 % and by the share closing price of OTE, as quoted on the Athens Stock Exchange <sup>(50)</sup>.
- (131) On the date of the publication of Law No 3371/2005 (14 July 2005), the closing price of the OTE share was EUR 16,35. At that date, the State's contribution corresponded to around EUR 315 million. Since then, the share price of OTE has gradually increased, fluctuating from EUR 23 in mid-January 2007 to EUR 21 on 27 February 2007. Thus on 27 February 2007, the value of the 4 % shareholding of the Greek State in OTE stood at around EUR 410 089 618.
- (132) The value of the Greek State's contribution at that date was higher than the amount corresponding to the extra burden of OTE (EUR 390,4 million).
- (133) In its reply at the opening of the formal investigation, given the impossibility of predicting the future closing price of the OTE share, the Greek authorities formally undertook to repeal Law No 3371/2005 should the value of the 4 % stake exceed the amount of EUR 390,4 million on the day of its transfer to the pension fund and to take any other necessary measure to ensure that the value of the shares to be transferred to TAP-OTE would not exceed EUR 390,4 million.

<sup>(50)</sup> Namely, 19 623 315,16 × OTE share price.



(134) Accordingly, the Commission's assessment in the present case is based on the undertaking given by Greece that its envisaged contribution to TAP-OTE will not exceed the amount of EUR 390,4 million that corresponds to the extra costs of the VRS for OTE, and that, if necessary, it will also repeal Law No 3371/2005.

### 1. Other advantages

(135) At the opening of the formal investigation the Commission observed that the additional costs borne by OTE owing to the special employment status of its employees would not necessarily justify the State's contribution, given that OTE might have benefited, and may continue to benefit, from other advantages which neutralise the cost of the VRS (see recital 47). Such advantages could arise from the specific employment status of OTE employees, in general, or specific interventions, reducing OTE's labour costs below the labour costs of companies subject to the generally applicable labour laws, such as exemption from unemployment charges or relief from pension obligations. OTE might also derive benefits from its former monopoly position, compensating for the disadvantages resulting from the extra costs of the VRS (in particular as regards its fixed telecom network).

#### a. Labour-law-related advantages

(136) The Commission now considers that the compatibility assessment under Article 87(3)(c) of measures that aim to compensate an ex-monopolist for the extra costs arising from a period when the company concerned operated as a monopoly should be limited to examining whether the company has benefited, or continues to benefit, from other advantages of a similar nature (such as, in the case at hand, other labour-law-related advantages enjoyed by OTE) which may neutralise the costs in question.

(137) In this regard, the report by Prof. Levantis commissioned by the Greek State concludes that OTE does not benefit from any kind of labour advantages, and that for the rest, OTE is subject to the general labour law framework like any other public limited company. Moreover, the Greek authorities have confirmed, as requested by the Commission at the opening of the formal investigation, that OTE, like any other employer in Greece, is subject to the payment of unemployment insurance contributions in accordance with the applicable social security legislation.

(138) At the opening of the formal investigation, the Commission also queried whether OTE had in the past benefited from a relief from its pension liabilities. According to the information submitted by the Greek

authorities, OTE has never been exempted or relieved from its pension obligations as an employer<sup>(51)</sup>.

#### b. Competition-related advantages

(139) The Commission considers that the question whether account should also be taken of other advantages that derive from the previous monopoly position of the undertaking concerned depends, in essence, on whether the relevant market has been fully liberalised, in the sense that an appropriate legal or regulatory framework exists to ensure that an ex-monopolist no longer enjoys any exclusive or special rights or other privileges, and that actual or likely distortions of competition can be dealt with effectively under the available *ex ante* regulatory remedies and/or under the *ex post* enforcement of the relevant competition law provisions.

(140) In this respect, in its submissions, the third party has focused essentially on the alleged anticompetitive behaviour of OTE on the fixed voice market and the alleged failings of the national regulatory authority to carry out its regulatory duties.

(141) The Commission notes that in accordance with Articles 7 and 13 of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive)<sup>(52)</sup>, the national regulatory authority has already designated OTE as having significant market power within all fixed markets that are included in the Commission Recommendation on relevant markets. As a result, OTE is currently subject to a set of integrated *ex ante* regulatory remedies both at wholesale and retail level. In particular, OTE is today obliged to provide third parties with: (a) wholesale access to its fixed network, (b) carrier selection and carrier pre-selection, (c) transit services and a whole set of network services complying with the principles of fairness, reasonableness and timeliness. As an operator with significant market power in the fixed line market, OTE also has an obligation of non-discrimination, transparency, accounting separation and auditing and is subject to an obligation of price control and cost

<sup>(51)</sup> Quite the reverse, by a series of legislative acts from 1994 to 2001 (Laws No 2257/1994, 2768/1999, 2843/2000 and 2937/2001), the Greek State required OTE to make certain *ad hoc* (capped) payments to TAP-OTE in order to cover the pension fund's operating deficits. More particularly, in 2001 OTE was obliged by law to pay a lump sum of GDR 120 billion (around EUR 4 billion) to cover TAP-OTE's deficits calculated for the years 2002-2011. Since OTE had no obligation whatsoever to guarantee the viability of TAP-OTE, these were payments made over and above OTE's own pension contributions as an employer.

<sup>(52)</sup> OJ L 108, 24.4.2002, p. 33.

accounting based on long-run average incremental costs on the basis of current costs of assets<sup>(53)</sup>. These remedies are also to be found in the regulation of the leased lines markets<sup>(54)</sup> and the market for wholesale broadband access<sup>(55)</sup>. Furthermore, the NRA has imposed on OTE local loop unbundling (LLU) prices which are at present the lowest in the EU.

- (142) Overall, the various cost accounting and accounting separation obligations imposed on OTE aim to ensure that OTE as a former monopolist should derive no advantage capable of undermining or distorting competition on the market<sup>(56)</sup>.
- (143) The Commission further notes that since the opening of the formal investigation, the NRA has also taken a number of *ex post* measures against OTE because of violations either of the existing regulatory framework or of the competition law provisions<sup>(57)</sup>.
- (144) In the light of all the above considerations, it appears that the existing sectoral regulatory framework already ensures to a large extent that the electronic communications market operates properly and that there are no

advantages for OTE resulting from its previous monopolistic position that are not dealt with by the framework, and in any event, no such quantifiable advantages have been found by the Commission or indicated by a third party.

#### c. OTE's exemption from the advertisement tax

- (145) In its submission, the third party stated that OTE has been exempted from the payment of the advertisement tax that other companies have to pay for every advertisement they place on any medium. The Commission considers that in principle such measures should be examined separately and not in the context of this procedure. The Commission is satisfied that in any event the exemption has not procured any advantage to OTE<sup>(58)</sup>.

## 2. Concluding remarks

- (146) It follows from the foregoing that as long as it does not exceed the extra burden imposed on OTE due to the permanent status and the high salaries of its employees, the planned contribution of the Greek State to the costs of the VRS of OTE, calculated at EUR 390 million, is an aid measure which pursues an objective of common interest in a necessary and proportionate way without adversely affecting trading conditions. Therefore, it is compatible with Article 87(3)(c) of the Treaty.

## VIII. CONCLUSION

- (147) It should be stressed that this Decision has been drawn up on the basis of the explicit undertaking given by the Greek authorities that they will repeal Law No 3371/2005 if on the date of the transfer to TAP-OTE of their 4 % shareholding in OTE the value of the shares thus transferred exceeds the extra costs of the VRS of OTE as verified and accepted by the Commission. The Commission has accordingly come to the conclusion that the extra costs of the VRS to OTE due to the life tenure employment status and high fixed salaries enjoyed by its staff amount to EUR 390,4 million.

<sup>(53)</sup> See Commission Decisions (no comments), Case EL/2006/0493: call origination on the public telephone network provided at fixed location, Case EL/2006/0494: call origination on individual public telephone networks provided at fixed location, and Case EL/2006/0495: transit services in the fixed public telephone network. [http://circa.europa.eu/Public/irc/info/ecctf/library?l=/ellda/adopted\\_measures&vm=detailed&sb=Title](http://circa.europa.eu/Public/irc/info/ecctf/library?l=/ellda/adopted_measures&vm=detailed&sb=Title)

<sup>(54)</sup> Commission Decision (no comments) Case EL/2006/0372: wholesale broadband access in Greece.

<sup>(55)</sup> Commission Decision (no comments) Case EL/2006/0491: the minimum set of leased lines in Greece.

<sup>(56)</sup> Pursuant to Article 7(3) of Directive 2002/21/EC, the Commission has also examined the above mentioned decisions and remedies imposed by the regulatory authority on OTE and has not expressed any serious doubts as to their compatibility with Community law and in particular with the objectives referred to in Article 8(2)(b) of the Framework Directive, including the obligation on national regulatory authorities to ensure, through their decision-making powers 'that there is no distortion or restriction of competition in the electronic communications market'.

<sup>(57)</sup> Thus, on 29 November 2006, the regulatory authority fined OTE a total of EUR 3 million, that is EUR 1 000 000 for breach of the existing regulatory framework (carrier pre-selection) and EUR 2 000 000 for an abuse of a dominant position (refusal to provide network access, leverage of market power, and abuse of a relation of economic dependency). Finally, on 2 March 2007, in the context of an injunction relief procedure, the authority issued two temporary orders, following a request filed by a number of alternative providers which OTE threatened with interconnection interruption, invoking the fact that these providers allegedly owed OTE significant debts. The measure temporarily prohibits OTE from interrupting the interconnection until the authority has decided on whether OTE's claims are founded in the context of a dispute settlement procedure in accordance with the current regulatory framework. See press release issued by EETT on 2 March 2007.

<sup>(58)</sup> As the Greek authorities have confirmed, even if it is true that OTE did not pay the tax in the past, it has always been in the same position as its competitors since no other telecommunication service provider was liable to pay the tax under Greek law. In accordance with Article 19(2) of Law No 1264/1982, public undertakings or utilities were exempted from the payment of the advertisement tax. In 2005, the Administrative Court of First Instance (Decision No 9564/2005), ruled that the notions of 'public service' and 'utilities' in Law No 1264/1982 should be interpreted as meaning that any licensed telecoms operator providing telecommunications services is eligible for exemption from the advertising tax irrespective of its status as a public or private company. As a result, the exemption did not put OTE in any advantageous position vis-à-vis its competitors.

(148) On the basis of the undertaking referred to, the Commission finds that the notified measure, examined in conjunction with the relevant case-law, including the *Combis* judgement, can be regarded as aid. However, the matter does not need to be pursued further as, even if it is assessed as aid, it is in any event compatible with the common market pursuant to Article 87(3)(c) of the Treaty,

HAS ADOPTED THIS DECISION:

*Article 1*

The 4 % shareholding in OTE that the Greek State is planning to transfer to TAP-OTE, provided that its value does not exceed, on the day of the transfer, the amount of EUR 390,4 million, constitutes aid which is compatible with the common market within the meaning of Article 87(3)(c).

Should the value of the 4 % shareholding of OTE that the Greek State is planning to transfer to TAP-OTE exceed, on the date of the transfer, the amount of EUR 390,4 million, Greece shall take all necessary measures to ensure that TAP-OTE will not receive any amount in excess of EUR 390,4 million.

*Article 2*

This Decision is addressed to the Hellenic Republic.

Done at Brussels, 10 May 2007.

*For the Commission*  
Neelie KROES  
*Member of the Commission*